

REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

[HIGH COURT OF AUSTRALIA.]

FEDERAL COMMISSIONER OF TAXATION APPELLANT ;

AND

SHAW AND ANOTHER . . . . . RESPONDENTS.

*Estate Duty (Cth.)—Assessment—Right of appeal to High Court from decision of Valuation Board—“ Decision . . . which, in the opinion of the High Court, involves a question of law ”—Value of shares in company not listed on Stock Exchange—Estate Duty Assessment Act 1914-1942 (No. 22 of 1914—No. 18 of 1942), ss. 16A, 25 (7).*

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MELBOURNE, March 29, 30.

The *Estate Duty Assessment Act* 1914-1942 provided :—By s. 16A : “ (1) Where the Commissioner is of the opinion that it is necessary that the following provisions should apply for the purpose of assessing the value for duty of an estate for the purposes of this Act, the following provisions shall apply—  
(a) the value of shares or stock in any company . . . shall be determined upon the assumption that the memorandum and articles of association or rules of the company, at the date of death, satisfied the requirements prescribed by the Committee or governing authority of the Stock Exchange at the place where the share or stock register is situate for the purpose of enabling that company to be placed on the current official list of that Stock Exchange.  
. . . (2) Any Board or Court having jurisdiction to determine, for the purposes of this Act, the value of any shares or stock to which the last preceding sub-section applies, may substitute its own opinion for, or use its own discretion in lieu of, any opinion or discretion of the Commissioner under that sub-section.” By s. 25 (7) : “ The Commissioner or the objector may . . . appeal to the High Court from any decision of the Valuation Board . . . which, in the opinion of the High Court, involves a question of law.”

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The estate of a deceased person included shares in a proprietary company the articles of association of which imposed restrictions on the transfer of shares so that the shares were not listed on the Stock Exchange of the place where the share register was situate. The commissioner having assessed the estate to duty under the *Estate Duty Assessment Act* 1914-1942, the question of the value of the shares was referred to a Valuation Board under s. 24 (4) of the Act. The Board valued the shares at a lower figure than that which the commissioner had fixed for the purposes of the assessment. It appeared from the reasons for the Board's decision that, in arriving at the value of the shares, it was influenced by the consideration that the shares were those of a proprietary company and there was lacking "that common knowledge of quality and competitive price that generally exists in relation to shares that have been listed for some time with the Stock Exchange." The commissioner sought to appeal to the High Court under s. 25 (7) of the Act. He contended that, there being no mention in the Board's reasons of s. 16A of the Act, it did not appear to have been considered—as it should—whether the section was applicable and, alternatively, that it had wrongly applied the section by having regard to the fact that the shares were not listed on the Stock Exchange; and, in either alternative, that a question of law was involved in the decision.

*Held* that the commissioner had not discharged the onus, which s. 25 (7) imposed on him, of showing that some particular identifiable question of law was involved in the Board's decision and, therefore, the appeal did not lie. It should not be assumed that the Board had neglected to consider the applicability of s. 16A; on the other hand, it did not appear that the Board had adopted any particular view of the meaning of the section as to whether or not it allowed the fact of non-listing on the Stock Exchange to be taken into account in order to reduce the value that would otherwise be assigned to the shares.

*Federal Commissioner of Taxation v. Sagar* (1946) 71 C.L.R. 421, referred to.

APPEAL from a Valuation Board under the *Estate Duty Assessment Act* 1914-1942.

The Federal Commissioner of Taxation assessed the estate of Eliza May Shaw, deceased, to duty under the *Estate Duty Assessment Act* 1914-1942 and gave notice of the assessment to Herbert Buchanan Shaw and William Edward McPherson, the administrators of the estate. From an "alteration sheet" which accompanied the notice it appeared that the commissioner had assessed shares in companies which formed part of the estate at higher values than those which had been returned by the administrators. At their request the matter of the values was referred to a Valuation Board under s. 24 (4) of the Act. The Board fixed lower values than had been fixed by the commissioner.



From the decision of the Board the commissioner sought to appeal to the High Court.

The facts appear in the judgment hereunder.

*R. M. Eggleston* and *J. F. Patrick*, for the appellant.

*J. B. Tait* K.C. and *D. I. Menzies* K.C., for the respondents.

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LATHAM C.J. delivered the following judgment :—

This is an appeal under the *Estate Duty Assessment Act* 1914-1942, s. 25, from a decision of a Valuation Board.

Section 24 (4) of the Act provides that if an objector to an assessment under the Act is dissatisfied with a decision of the commissioner, he may within thirty days after the service by post of notice of that decision—(a) in writing, request the commissioner—(i) to refer so much of the decision as relates to the value assigned to any property included in the estate to a Valuation Board for review of that value.

In the present case, the administrators of the estate were dissatisfied with the decision of the commissioner in relation to the value of certain shares included in the estate and requested the commissioner to refer so much of the decision as related to the value assigned to those shares to a Valuation Board. The shares were included in the estate of Eliza May Shaw deceased, who died on 6th January 1943. Estate duty was payable upon the value of the estate of the deceased person (*Estate Duty Assessment Act*, s. 8).

The estate included certain shares owned by the deceased—59,842 £1 shares in McPherson's Pty. Ltd., and 63,234 £1 shares in Private Trust and Investment Pty. Ltd. The latter company owned 410,275 shares in McPherson's Pty. Ltd. Accordingly the value of the shares in McPherson's Pty. Ltd. was an important element in determining the value of the shares in Private Trust and Investment Pty. Ltd. The commissioner assessed the value of the shares in McPherson's Pty. Ltd. at £2 per share and in Private Trust and Investment Pty. Ltd. at £5 per share.

The administrators of the estate, as already stated, objected and the question of the value of the shares was referred to a Valuation Board for review. The review took place and the Board assessed the value of the shares in McPherson's Pty. Ltd. at 34s. per share and in Private Trust and Investment Pty. Ltd. at £4 15s. per share. The commissioner has appealed from that decision to this Court.

It is objected on behalf of the respondents that no appeal lies because, it is said, the decision of the Valuation Board does not



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involve any question of law and this Court accordingly should not form the opinion that it involves such a question. The right of appeal from the decision of the Valuation Board is given by s. 25 (7) of the Act, which provides—"The Commissioner or the objector, may, within thirty days after the date of the Valuation Board's decision, appeal to the High Court from any decision of the Valuation Board in this connection, which, in the opinion of the High Court, involves a question of law, and the Valuation Board shall refer to the High Court any question of law arising before the Valuation Board, and the decision of the High Court shall be final and conclusive."

Before examining the question whether the decision of the Valuation Board involves a question or questions of law, it will be desirable to refer to certain of the provisions of s. 16A of the Act. That section contains the following provisions—" (1) Where the Commissioner is of the opinion that it is necessary that the following provisions should apply for the purpose of assessing the value for duty of an estate for the purposes of this Act, the following provisions shall apply :—

(a) the value of shares or stock in any company, whether incorporated in Australia or elsewhere, shall be determined upon the assumption that the memorandum and articles of association or rules of the company, at the date of death, satisfied the requirements prescribed by the Committee or governing authority of the Stock Exchange at the place where the share or stock register is situate for the purpose of enabling that company to be placed on the current official list of that Stock Exchange."

Other provisions contained in paragraphs (b) and (c) are not material for the purpose of this case. Sub-section (2) of s. 16A is as follows—"Any Board or Court having jurisdiction to determine, for the purposes of this Act, the value of any shares or stock to which the last preceding sub-section applies, may substitute its own opinion for, or use its own discretion in lieu of, any opinion or discretion of the Commissioner under that sub-section."

Thus, whether or not the commissioner applied s. 16A in making his assessment (and there is no material before the Court which shows whether or not the commissioner did so apply the section) it is clear that it was open to the Board upon the review to apply, for the purpose of assessing the value for duty of the shares in this company, the provision which is contained in paragraph (a) of s. 16A (1).



McPherson's Pty. Ltd. was a proprietary company and the articles of association imposed restrictions upon the transfer of shares, and therefore it was open to the commissioner or to the Board upon review to value the shares upon the basis set out in s. 16A (1) (a).

Upon s. 16A, it was held in *Federal Commissioner of Taxation v. Sagar* (1) by my brother *Williams* that the provisions of the section did not bring about the result that if the section were applied the valuation must be made on the assumption that the company was listed on the Stock Exchange at the date of death.

Paragraph (a), which has been read, allows a valuation to be made upon the assumption that the memorandum and articles of association satisfied the requirements for listing upon the Stock Exchange. This provision does not provide for the valuation of shares upon the assumption that the company is actually listed upon the Stock Exchange. That is the effect of the decision of my brother *Williams*. It is a decision which I should follow and apply in the present case if it is relevant to the decision on any issue which arises.

The Board reached its decision as to the value of the shares, as the statement of reasons for the decision of the Board shows, in the following way: When Mrs. Shaw died, McPherson's Pty. Ltd. was a proprietary company subject to articles of association which, as already stated, contained provisions restricting transfers of shares. Where articles of association provide for such restriction, the shares of the company cannot be listed upon the official list of the Stock Exchange. But in December 1944, nearly two years after the death of Mrs. Shaw, the company became a public company and its shares were bought and sold in the vestibule of the Stock Exchange, though they were not listed on the current official list. During the months from June to November 1945, the shares were sold in what the Board found to be a competitive market at prices ranging from 47s. 6d. to 50s. 6d. The average price obtained upon these sales was taken by the Board at 49s.

The Board took these sales in June to November 1945 of shares in McPherson's Ltd., the public company into which the proprietary company had been transformed, as a basis for arriving at a valuation of the shares as in January 1943. The amount of 49s. was reduced by the Board by reason of three separate elements or considerations. In the first place, the Herald share index for thirty industrial companies, Melbourne, showed the index at 102 in 1945. In January 1943, the index figure for such companies was ninety-two. A proportionate reduction of the 49s. already mentioned was made, bringing about a reduction to 44s. 2d. per share.

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In the second place, the assets owned by McPherson's Pty. Ltd. had increased between January 1943 and the later date at which the shares in the successor public company were bought and sold upon the market. The Board deducted 6s. 5d. per share to allow for this increase in the value of assets at the later as compared with the earlier date. Thus the figure of 44s. 2d. was reduced to 37s. 9d.

In the third place, the Board made a further deduction of 3s. 9d. per share by reason of the fact that, in January 1943, the company was a proprietary company, the shares of which were not listed upon the Stock Exchange, so that there was no general market for its shares and there was not available for the consideration of possible purchasers what the Board described as the "common knowledge of quality and competitive price that generally exists in relation to shares that have been listed for some time with the Stock Exchange." Thus the Board reached an amount of 34s. as representing the value of the shares in McPherson's Pty. Ltd. This value was applied to the shares in that company held by Private Trust and Investment Pty. Ltd., with the result that the value of the shares of the deceased in the latter company was assessed at £4 15s. per share.

It is contended for the commissioner that the decision of the Board involves certain questions of law so that an appeal lies under s. 25 (7) of the Act. Under similar provisions in the *Income Tax Assessment Act*, where an appeal was given from a decision which, in the opinion of the High Court, involved a question of law, it was stated in *Ruhamah Property Co. Ltd. v. Federal Commissioner of Taxation* (1) by the Chief Justice and Gavan Duffy, Powers and Starke JJ. :—"An appeal has now been brought to this Court under s. 51 (6) of the Act, which provides that a taxpayer may appeal to the High Court from any decision of the Board" (which was a Board of Review in this case) "which in the opinion of the High Court involves a question of law." The words are the same as those to be found in s. 25 (7) of the *Estate Duty Assessment Act*. Their Honours continued :—"If some question of law be involved in the decision of the Board we apprehend that the whole decision of the Board, and not merely the question of law, is then open to review," and reference is made to *Ex parte Walsh and Johnson*; *In re Yates* (2). It will be observed that the words used by their Honours are: "If some question of law be involved" and not such words as: "If some question of law be involved in the decision and that question of law has been wrongly

(1) (1928) 41 C.L.R. 148, at p. 151.

(2) (1925) 37 C.L.R. 36, at p. 130.



decided.” Their Honours held in the *Ruhamah Case* (1) that there had been an erroneous decision of the Board upon a question of law. *Isaacs J.*, however, said this at p. 155 :—“ It will be observed that it is the ‘ decision ’ which must involve a question of law. If that condition exists, then the whole case is within the original jurisdiction of the Court (see *Federal Commissioner of Taxation v. Munro* (2) ). If the Board’s decision on examination, be found to be unaffected by any erroneous view of the law—as, for instance, if it be found that the question of law has been correctly apprehended, then, in my opinion, on a true construction of the sub-section, it is the duty of this Court to abstain from altering the Board’s conclusion of fact. Any other course is, in my opinion, contrary to the intention of Parliament.”

His Honour proceeds to say that the Board is a business tribunal, that the taxpayer has the choice of going to the Board or to a court, and that if there was no error in law in the decision of the Board, it was the intention of Parliament that the matter should not be brought before a court.

I fully appreciate the weight of the considerations to which *Isaacs J.* refers. Indeed, it is difficult to understand why an appeal should be given only when a question of law is involved unless it was intended to give the appeal for the purpose, at least primarily, of correcting errors of law. It has been suggested by Mr. *Eggleston* that the view of *Isaacs J.* was approved by my brothers *Rich* and *Dixon* in *Commissioner of Taxation v. Miller* (3) and that, sitting as a single judge, I am bound to hold that the words in s. 25 (7) “ any decision of the Valuation Board . . . which, in the opinion of the High Court, involves a question of law ” mean any decision of the Valuation Board whereby a question of law is erroneously decided. Upon a close examination of what was said in *Commissioner of Taxation v. Miller* (3) I am of opinion that this is not the case. *Rich J.* decides the case upon the ground that the only question raised, namely, whether a taxpayer was a resident of New Guinea, was one of fact and that therefore there was nothing to justify the Court in entertaining the appeal. Similarly, *Dixon J.* at p. 103 states that he was not satisfied that the decision of the Board involved any question of law. It is true that at p. 104 his Honour says, “ No proposition of law appears to have been in contest and no contestable proposition of law appears to have been assumed. It all seems to me to come back to the so-called question of fact. I am therefore not satisfied that the appeal lies.” Here

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(1) (1928) 41 C.L.R. 148.

(2) (1926) 38 C.L.R. 153.

(3) (1946) 73 C.L.R. 93.



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there is a suggestion that unless a proposition of law has been erroneously decided, no appeal lies, but the actual ground of his Honour's decision is that the decision of the Board was a decision simply upon a question of fact. Thus I am of opinion that it has not been decided in any case that the jurisdiction of the Court under such a section as this depends upon it being shown in advance as it were that a decision of the Board upon a question of law was erroneous.

Section 25 (7) does not provide for an appeal from a decision upon a question of law. If it did so provide, it would be clear that there could be an appeal only where it was alleged that a decision upon a question of law was erroneous and that the appeal could succeed only where that allegation was held to be established. Upon this view, no appeals which the Court heard could, so far as they depended upon points of law, be unsuccessful. It would depend upon the words of the statute in such a case whether, when it was held that a decision upon a question of law was erroneous, the appellate tribunal could consider also questions of fact. The words of the section are:—"any decision of the Valuation Board in this connection, which, in the opinion of the High Court, involves a question of law."

I am unable to appreciate the reason for inserting the words "in this connection," as also I have a difficulty in understanding why the section contains the absolute provision that the Valuation Board shall refer to the High Court any question of law arising before the Board; but it is not necessary to consider the effect of these words, if any, in the present case.

I have great difficulty in reading the words "any decision which, in the opinion of the High Court, involves a question of law," as meaning that there is an appeal from a decision only where that decision involves a question of law which has been wrongly decided by the Board. I shall therefore deal with the case upon the basis that, whatever may be the correct opinion upon the question whether this Court has jurisdiction to entertain an appeal only when it is shown that the decision on the question of law was erroneous, at least it must appear before an appeal can be held to be competent that the decision of the Board did involve what in the opinion of the High Court was a question of law.

The questions of law which it is contended by the appellant are involved in the decision of the Board are the following:—(1) That the Board should have adverted to the question of the applicability of s. 16A. The decision of the Board, it is said, does not show



whether or not the Board adverted to the question whether it was necessary to apply that section, and it is argued that a failure to consider this question amounts to an error in law. The onus is upon the appellant to show that some particular identifiable question of law is involved in the decision. In the present case, the reasons for the decision of the Board do not, in my opinion, show whether or not it applied s. 16A. The decision might have been exactly the same even if s. 16A had never been enacted, but it should not be assumed that the Board neglected the provisions of the Act and did not consider whether or not to apply s. 16A. In my opinion, it cannot be said that the reasons for the decisions of the Board show that it neglected to consider this question.

(2) Alternatively, it is contended that the decision shows that the Board did apply s. 16A, but applied it wrongly by following the decision of his Honour *Williams J.* in *Sagar's Case* (1) in that the Board allowed a deduction (3s. 9d.) from what would otherwise have been held to be the value of the shares by reason of the fact that the shares were not listed upon the Stock Exchange. In my opinion, the decision of the Board does not show that the Board adopted any particular view of the meaning of s. 16A in respect of whether or not the section allowed the fact of non-listing upon the Stock Exchange to be taken into account in order to reduce the value that would otherwise be assigned to the shares. Accordingly, on these points the appellant has not satisfied me that these particular questions were involved in the decision of the Board. I add that it was not contended that a decision upon the question whether it was necessary to apply s. 16A in a particular case was itself a decision upon a question of law.

(3) As to the deduction of 6s. 5d. it was argued for the appellant that the process of thought of the Board was that the Board first ascertained the market value of the shares in *McPherson's Ltd.*—the public company—and then adopted a standard other than that of market value in deducting 6s. 5d. on account of increase in assets, namely, a standard or basis of assets value. In my opinion, the stated reasons of the Board show that what the Board did was to take into account the increase in the value of assets and to form an opinion that this increase would raise the value of the shares in the market to the extent of 6s. 5d. The decision upon this question was a decision upon a question of fact, namely, the question as to how far an increase in value of assets would increase, if at all, the market value of the shares in the company. No question of law, in my opinion, is involved in this matter.

(1) (1946) 71 C.L.R. 421.

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Accordingly, in my opinion, it has not been shown by the appellant that the decision of the Valuation Board involved any question of law and I therefore hold that the appellant has no right of appeal.

*Appeal dismissed with costs.*

Solicitor for the appellant: *H. F. E. Whitlam*, Crown Solicitor for the Commonwealth.

Solicitors for the respondents: *J. M. Smith and Emmerton*.

E. F. H.